IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1005

LARRY PRESSLER, Member, United States House of Representatives, *Appellant,*

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury,

FRANCIS R. VALEO, Secretary of the United States Senate,

KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM AND SUGGESTION OF MOOTNESS

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The appellee Kenneth R. Harding, Sergeant-at-Arms of the United States House of Representatives, respectfully moves to dismiss or affirm the judgment of the United States District Court for the District of Columbia in this case. Rule 16(1)(c) and (d).

The motions filed by the two other appellees have fully set forth the facts and the statutes involved. Those matters need not be repeated here.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. . . .

Article I, Section 8, cl. 18

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

QUESTIONS PRESENTED

1. Whether the appellant, as a sitting Member of the House of Representatives, has standing before this Court to challenge the constitutionality of the procedures established in the Salary Act of 1967 and the Adjustment Act of 1975 for ascertaining the compensation to be received by Senators and Representatives.

2. Whether a constitutional challenge to the methods chosen by Congress to ascertain the compensation to be received by Senators and Representatives, pursuant to Article I, Section 6, raises a political and non-

justiciable question that has been textually and totally committed by the Constitution to the Congress.

3. Whether the various procedures chosen by Congress for ascertaining compensation under the Salary Act of 1967 and the Adjustment Act of 1975 are constitutionally permissible as being "necessary and proper" methods, within the meaning of Article I, Section 8, cl. 18, for carrying into execution the power vested in Congress by Article I, Section 6, to ascertain by law the compensation of Senators and Representatives.

MOTION TO DISMISS

The appellee Harding hereby moves to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution. The nonjusticiability of this appeal is obvious for two reasons: (1) the appellant lacks standing to process this appeal; and (2) the appeal presents only questions that are political in nature and hence beyond the scope of judicial review. And, as was said in *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 215 (1974), "either the absence of standing or the presence of a political question suffices to prevent the power of the judiciary from being invoked by the complaining party."

A. The Appellant Lacks Standing To Process the Appeal to This Court

While the three-judge court below held that the appellant had standing to assert his claims "under the unique circumstances of this particular case" (J.S. App. 5a), that determination is not binding on this Court. It is the "usual rule in federal cases . . . that an actual

controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *DeFunis* v. *Odegaard,* 416 U.S. 312, 319 (1974). This Court, in other words, must make an independent evaluation of appellant's standing at this appellate stage of the case.

In his complaint (¶ 3), appellant identified himself as a citizen and taxpayer of the United States and a Member of the House of Representatives. The court below properly rejected (J.S.App. 4a) appellant's claimed standing as a citizen and taxpayer, citing the one case directly in point holding that a citizen taxpayer lacks standing to challenge the Salary Act of 1967 as contrary to Article I, Section 6. *Richardson* v. *Kennedy,* 401 U.S. 901 (1971), affirming 313 F.Supp. 1282 (W.D.Pa. 1970).[1]

The court below, however, plainly erred in according appellant standing, in the Article III sense, with respect to his status as a sitting Member of the House of Representatives. In an attempt to satisfy the constitutional requirement that there be some actual or

[1] Appellant asserted in his complaint (¶¶ 14, 15) that (1) as a United States citizen, he had been deprived of "his right to have Members of Congress accountable for increases authorized in their compensation;" and (2) as a United States taxpayer, he had been deprived of his right to have tax monies received by the Federal Government expended pursuant to laws enacted in accordance with the Constitution of the United States."

Each of these asserted harms is nothing more than a "generalized grievance" shared in substantially equal measure by all or a large class of citizens and taxpayers. Such harm normally does not warrant exercise of a federal court's jurisdiction. *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975); *Flast* v. *Cohen,* 392 U.S. 83, 106 (1968).

threatened injury to sustain his standing in this respect, appellant alleged in his complaint (¶ 16) that the appellees had injured and will continue to injure him

> "... as a Member of the United States House of Representatives by interfering with the performance of his constitutional responsibilities and congressional duties and by depriving him of his constitutional right to vote on each adjustment proposed in congressional salaries."

But neither those allegations nor the facts of record supply the injury or threat of injury so essential to the concept of standing.

(1) Appellant cannot acquire standing by erroneously asserting that his individual "constitutional responsibilities and congressional duties" have been interfered with by the actions of Congress pursuant to Article I, Section 6. That portion of the Constitution imposes "responsibilities" and "duties" on Congress, not on the individual Members thereof. And since appellant does not sue on behalf of Congress, he has no standing to complain of an alleged interference with the responsibilities of a third party, the Congress. See *Tileston* v. *Ullman,* 318 U.S. 44 (1943); *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975).

(2) To the extent that appellant has particularized his alleged injury by referring to an interference with "his constitutional right to vote on each [proposed salary] adjustment," the appellant's standing is not improved. A Congressman has no "constitutional right" to have any proposed salary adjustment brought to a vote; indeed, there is no constitutional compulsion on Congress to call for a vote on any salary proposal or on any other type of proposal. And in any

event, the vote that triggered the 1975 automatic salary adjustment was the vote to adopt the Adjustment Act itself. That was the critical vote that authorized the mechanical adjustments from time to time. And appellant did in fact cast an unimpaired negative vote with respect to that authorizing statute (121 Cong. Rec. H7858, July 30, 1975).

In very limited situations, where legislative votes have in fact been cast in favor of specific propositions, courts have recognized that the legislators have standing to maintain the effectiveness of their votes from illegal interference by non-legislative sources. *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Kennedy* v. *Sampson,* 511 F.2d 430 (C.A.D.C., 1974).[2] But prior to the decision below, no court had accorded standing to a legislator to protest that the very body of which he is a member has, by allegedly unconstitutional legislation, destroyed the possibility of future roll-call votes by that legislator on a particular kind of proposal. As stated by the Fifth Circuit in *Korioth* v. *Briscoe,* 523 F.2d 1271, 1278 (C.A. 5, 1975), "None of the cases has indicated that a legislator, simply by virtue of that status, has some special right to invoke judicial con-

[2] *Coleman* involved a challenge by state legislators that the lieutenant governor, in a procedure violative of the United States Constitution, had broken a tie vote in a state senate in favor of ratification of a constitutional amendment. This Court held that the plaintiffs had a sufficiently "plain, direct and adequate interest in maintaining the effectiveness of their votes" to give them standing. 307 U.S. at 438.

Kennedy recognized standing in a suit by Senator Kennedy to compel the official publication of a validly enacted law which had remained unpublished because of an attempted, but legally ineffective, pocket veto by the President. The court found that the Senator's "objection in this lawsuit is to vindicate the effectiveness of his vote." 511 F.2d at 436.

sideration of the validity of a statute passed over his objecting vote"—which is a perfect description of appellant's situation.[3]

(3) The attempt of the court below to find standing in appellant's attack upon his own colleagues' legislative actions will not withstand analysis. The opinion acknowledged that appellant alleged impairment of the efficacy of his vote not by the Executive but "by the failure of other members of Congress to assume an affirmative responsibility specifically placed upon them by language of the Constitution" (J.S.App. 4a). It then proceeded to find impairment in the automatic raising of congressional salaries in October of 1975, under the Adjustment Act, "without action by the House and Senate."

Several misconceptions about the constitutional duties of Congress and the legislative process here involved are apparent from that opinion. Certainly no language in the Constitution (Article I, Section 6, in particular) places an "affirmative responsibility" on "other members of Congress" to enact the particular kind of legislation that would provide a roll-call vote for every future salary increase proposal. On the contrary, the ultimate decision by the court below (Part II of its opinion) was that the Adjustment Act and Salary Act procedures that were alleged to impair the efficacy of appellant's vote were indeed "not prohibited by Article I, Section 6" and do not "contravene the Constitution" (J.S.App. 8a). Mr. Pressler's

[3] See also *Holtzman* v. *Schlesinger,* 484 F.2d 1307 (C.A. 2, 1973), certiorari denied, 416 U.S. 936; *Harrington* v. *Schlesinger,* 528 F.2d 455 (C.A. 4, 1975); *Harrington* v. *Bush,* unreported (C.A. D.C., Feb. 18, 1977, No. 75-1862); *Metcalf* v. *National Petroleum Council,* unreported (C.A.D.C., Feb. 18, 1977, No. 76-1223).

colleagues, in other words, were found not to have an "affirmative obligation" to subject all congressional salary increases to the full vote of the House and Senate. How, then, can they be said to have circumvented the traditional legislative process so as to have "impaired the efficacy of Mr. Pressler's vote" (J.S.App. 5a)? Under these circumstances, the appellant's contrary and frivolous allegations cannot confer standing on him to attack a perfectly constitutional legislative process.

(4) Moreover, the court below ignored the critical facts of record that the appellant has at all times possessed the undiminished right to introduce legislation disapproving of all proposed salary increases, repealing the statutory procedures of which he complains, or establishing new levels or standards of congressional compensation. That he has not done so, or that he has been unable to convince a majority of the Congress to support such measures, cannot disguise the fact that his colleagues have in no way impaired the effectiveness of Mr. Pressler's vote on compensation matters.

All that the appellant is asserting is a general complaint about his own legislative ineffectiveness and his own dissatisfaction with the workings of the congressional processes. That assertion cannot create sufficient standing to sustain this appeal.

B. The Appeal Presents Questions That Are Political in Nature

From what has been said above, it becomes readily apparent that this appeal involves the methods chosen by Congress in executing its power under Article I, Section 6, to ascertain its own compensation. The sole

question presented by the appellant (J.S. 2)[4] is a classic illustration of a political question that concerns matters that are totally and textually committed by the Constitution to the Congress. As such, this question cannot and should not be addressed or resolved by the federal judiciary. See *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), reaffirmed in *Powell* v. *McCormack,* 395 U.S. 486, 518-519 (1969).

The entire issue of congressional compensation is committed by Article I, Section 6, of the Constitution to the Congress itself. That obvious fact is further confirmed by the constitutional debates cited by appellant (J.S. 14-15). And the correlative issue of what "methods" Congress can use in implementing that power to ascertain its own compensation brings into focus the authority of Congress under Article I, Section 8, cl. 18, to make all laws "necessary and proper for carrying into Execution" such powers as that contained in Article I, Section 6. The selection of the method deemed "necessary and proper" for executing or implementing any such power vested in Congress is a matter totally committed to the discretion of Congress. Chief Justice Marshall's ruling for the Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423 (1819), made it clear that this Court "disclaims all pretensions" to tread on the legislative ground staked out in the "necessary and proper" clause of Article I, Section 8.

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[4] The question there presented is "Whether the *methods* of determining salary rates for Senators and Representatives under section 225 of the Postal Revenue and Salary Act of 1967 and section 204(a) of the Executive Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for members of Congress *without requiring a direct vote* by either House of Congress." [Emphasis added.]

As was said in an analogous context in *Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973), "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process."[5]

MOTION TO AFFIRM

Alternatively, the appellee Harding moves to affirm the judgment of the three-judge court that the Salary Act and the Adjustment Act "are not prohibited by Article I, Section 6" and, in their ascertainment of congressional compensation, do not "contravene the Constitution" (J.S. App. 8a).

While the court below noted that the interpretation of the meaning and effect of Article I, Section 6, is "a matter of first impression" (J.S. App. 6a), the court's resolution of the matter is so eminently correct as to warrant an affirmance by this Court. The three-judge court properly refused to give the "ascertained by Law" phrase of Article I, Section 6, a narrow, pedantic reading that would divorce the Compensation Clause from other portions of the Constitution and from the realities of the legislative processes. And it properly

[5] The court below, in footnote 2 of its opinion (J.S. App. 4a), sought to avoid the political question doctrine by stating that where statutes are questioned "under a specific constitutional clause" the political question doctrine is inapplicable "merely because a decision might have political consequences." But the appellees do not rest their political question argument on any such "political consequences." The argument rests, rather, on the constitutional notion that questions committed to the Legislative Branch by the Constitution are "political" in nature and thus outside the realm of judicial scrutiny.

found that the Constitutional Convention confirmed the fact that "Congress should have ultimate responsibility for determining by law what the compensation of its own members should be, as opposed to the suggestion that this final responsibility be delegated to others" (J.S. App. 7a). All that the appellant has done before this Court is to repeat the historical and legal arguments that were fully considered and found wanting by the court below.

Significantly, the appellant totally ignores the lower court's careful coordination of the Compensation Clause with other portions of the Constitution, particularly the Necessary and Proper Clause of Article I, Section 8.[6] It was in that latter clause that the court found constitutional sanction for the "one-House veto" procedures of the Salary Act and the automatic salary adjustment procedures of the Adjustment Act. The court thus adopted the constitutional rationale urged upon it by the appellees Harding and Valeo, a rationale that may be briefly summarized as follows:

(1) Article I, Section 6, of the Constitution vests exclusive power in Congress to "ascertain by Law" the compensation of Senators and Representatives.

(2) Article I, Section 8, cl. 18, of the Constitution vests in Congress the power to make all laws "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, . . ."

[6] The opinion of the court below, as reprinted in the appendix to the jurisdictional statement, contains an erroneous reference to the "necessary and proper" clause of "Section 7" (J.S. App. 8a). The correct reference is to "Section 8," and the court below ordered that this correction be made in its opinion.

Thus Congress can make whatever laws are deemed "necessary and proper" for carrying the Compensation Clause (Article I, Section 6) "into Execution."

(3) This Court's decision in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819), interpreted the Necessary and Proper Clause as allowing to Congress "that discretion . . . which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." And the Court added that such discretionary choices made by Congress that are plainly adapted to carrying a vested power into execution and that "are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." See also *United States* v. *Fisher,* 2 Cranch 358, 396 (1805).

(4) It follows that the challenged procedures for ascertaining compensation under the Salary Act and the Adjustment Act, not being prohibited by the Constitution, are permissible and unreviewable choices by Congress, choices deemed "necessary and proper" to help execute the vested power to ascertain congressional compensation. Appellant's objection (J.S. 17), that these choices are impractical, inadequate and unsuitable, and give the voters no record of where their representatives stand on a salary increase, cannot provide any basis for judicial review of matters so completely embedded in the discretion of Congress. Indeed, the fact that this constitutional analysis inevitably leads one to the vast discretionary reservoir of congressional power known as the Necessary and Proper Clause serves to emphasize the inherently political nature of the constitutional question appellant has asked. The choice of the "one-House veto" or the automatic adjustment procedures is basically a political or discretionary choice to be made by the Congress.

Because the choices here made by Congress are so discretionary and therefore so non-reviewable, the so-called "important questions of public policy" surrounding those choices, as advanced by the appellant (J.S. 21), cannot justify full briefing and oral argument of this appeal. Whether the present scheme of salary adjustments for federal officials is adequate, or whether Congress has been made sufficiently accountable to the public on matters of compensation, are political and practical judgments which no court should address, even as an excuse for assessing a constitutional issue on its merits. And with respect to the sums of public finances said to be at stake, or the appellant's desire to remove "all existing constitutional doubt about the existing legal structure" under his attack (J.S. 21), the essentially political and advisory thrust of those considerations argues against any plenary review by this Court.

The decision below represents a limited but perhaps necessary incursion into the political question arena, and should be affirmed. It properly interprets the Compensation Clause on its face and delineates its place in the constitutional scheme, particularly in relation to the Necessary and Proper Clause. That appears to be all that the federal judiciary can properly say about the "one-House veto" and the automatic salary adjustment provisions of the Salary Act and the Adjustment Act, at least with respect to the ascertainment of congressional compensation.

One final comment remains. The doctrines that compose the concept of Article III justiciability, particularly those of standing, ripeness and political question, may well preclude any federal court from ever reaching the constitutional challenges that have been made

to the highly-publicized "one-House veto" procedure. Thus in *Clark* v. *Valeo,* now pending before this Court as No. 76-1105, the Court of Appeals for the District of Columbia Circuit, on January 21, 1977, found that challenges to that procedure in the federal election laws were not justiciable for reasons of ripeness and judicial prudence, without even reaching the additional problems of standing and political questions. In two other actions as yet unresolved by the lower courts, where challenges have been made to the "one-House veto" provisions of the Salary Act, the courts must first confront serious issues whether such challenges have been presented in a justiciable form. *Atkins, et al.* v. *United States,* Nos. 41-76, 132-76, 357-76 (Ct. Cl.) (judicial salaries); *McCorkle* v. *United States,* No. 76-1479 (C.A. 4) (executive salaries). Overlaying all these cases, in other words, is the Article III requirement that there be a justiciable "case or controversy" in order to permit the judiciary to reach the ultimate constitutional questions about the "one-House veto."

SUGGESTION OF MOOTNESS

On April 4, 1977, the Congress adopted an amendment to § 225(i) of the Salary Act of 1967, 2 U.S.C. § 359(1), that effectively eliminates the "one-House veto" procedures under that Act, about which the appellant complains.[7] As amended, § 225(i) now provides that congressional approval of the President's salary increase recommendations shall be as follows:

> "(1) Within sixty (60) calendar days of the submission of the President's recommendations for the Congress, each House shall conduct a separate vote on each of the recommendations of the President with respect to paragraphs (A) [congressional rates of pay], (B) [rates of pay of certain offices and positions in the legislative branch], (C) [rates of pay of justices, judges and other personnel in the judicial branch], and (D) [rates of pay of offices and positions under the Executive Schedule] of subsection (f) of this section, and shall thereby approve or disapprove the recommendations of the President regarding each such subparagraph. Such votes shall be recorded so as to reflect the votes of each individual Member thereon. If both Houses approve by majority vote the recommendations pertaining to the office and positions described in any such subparagraph, the recommendations shall become effective for the offices and positions covered by such subparagraph at the beginning of the first pay period which begins after the thirtieth day following the ap-

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[7] This amendment originated as a rider to the bill extending the Emergency Unemployment Compensation Act of 1974. The amendment was approved by a 82-13 vote of the Senate on March 30, 1977, and was accepted by the House conferees in the ensuing conference. See 123 Cong. Rec. S5174-77 (daily ed., March 30, 1977). On April 4, 1977, the Senate approved the conference report by voice vote shortly after the House passed it 406 to 2.

proval of the recommendation by the second House to approve the recommendation."[8]

This revision moots that portion of appellant's complaint (Count I) that challenged the constitutionality of the provisions of the original § 225(i) under which, in the words of ¶ 9 of the complaint, "The President's recommendations become effective 30 days following transmittal of the budget, unless in the meantime other rates have been enacted by law or at least one House of Congress has enacted legislation which specifically disapproves of all or part of the recommendations." The new procedure whereby the votes of each individual Member must be recorded on the Presidential recommendations also moots ¶ 16 of the complaint, which alleged that appellant had been deprived by the original § 225(i) "of his constitutional right to vote on each adjustment proposed in congressional salaries." And that portion of the prayer for relief that seeks a declaration that the original §225(i) procedures for adjusting congressional rates of pay and salaries are "void and unconstitutional," a declaration upon which the injunctive request rests, must also be considered moot.

It appears, however, that this amendment of § 225(i) of the Salary Act does not affect the automatic cost-of-living salary increases authorized by the Adjustment Act. To the extent that appellant complains about the procedures under the Adjustment Act, the amendment may not moot his complaint.

But the new amendment does undermine most of the public policy arguments advanced by the appellant—

[8] This revised version of 2 U.S.C. § 359(1) is to be contrasted with the original version set forth in J.S.App. 15a.

and the *amici curiae*—as to the need for full briefing and oral argument of this appeal. Particularly affected is appellant's argument (J.S. 22) as to "a popular belief that Congress is not sufficiently accountable to the public . . . with respect to Congressional salaries." The new requirement of recording the votes of all individual Members on Salary Act increases drains all substance from that argument.

CONCLUSION

Because of appellant's lack of standing and the inescapable presence of a political question, this appeal should be dismissed for lack of justiciability. That lack of justiciability, moreover, has been compounded by the mootness of appellant's Salary Act challenges. And since mootness is an element of justiciability, the Court may deem it appropriate to dismiss the appeal without specifying which particular element of justiciability predominates.

Alternatively, of course, the appeal can be affirmed for the reasons expressed in Part II of the opinion below (J.S.App. 6a-8a).

Respectfully submitted,

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